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JOHN T. FEY,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

## PETITION FOR REHEARING

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. GR. INC., LAW PRINTERS, 600-602 BLVD. OF ALLIES, PITTSBURGH 22, PA.

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## PETITION FOR REHEARING

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petition of Anne Livingston Behr respectfully represents:

1. On December 10, 1956, this Honorable Court denied the petition for writ of certiorari in the above entitled case.

2. The first reason assigned for granting the writ (Petition, pp. 12-14) was the sufficiency and automatic

action of the affidavit of plaintiff filed pursuant to Section 144 of the Judicial Code (App. 7a-10a) which was erroneously stricken by District Judge Marsh. Had the affidavit been found to be sufficient, certiorari should have been granted. Petitioner averred, inter alia, in her said affidavit (App. 7a) that "she believes the Honorable Rabe F. Marsh, Jr., is prejudiced and biased against her cause and her counsel"; and argued (Petition, p. 13) that under Pennsylvania law ". . . a challenge to a judge's qualifications because of prejudice and hostility toward an attorney brings the judge within the meaning of 'unable to sit in any matter' ".

3. The second reason assigned for granting the writ (Petition, p. 14) was the lower courts' discriminatory refusal to grant plaintiff's motions to strike and suppress, the granting of which would result in the granting of certiorari.

4. The third reason assigned for granting the writ (Petition, 14-16) relates and adds support to the second; and the fifth reason assigned for granting the writ (Petition, p. 16) relates and adds support to the first and second.

5. The prejudice and bias against petitioner's counsel is a relatively recent thing, non-existent up to a few years ago. For several years petitioner's counsel, in addition to his excellent reputation, enjoyed unusual popularity at the bar, having been elected an Officer of the The Allegheny County Bar Association both opposed and unopposed. However, during the past few years he has appeared as a plaintiff against powerful, influential persons and as attorney for plaintiff against powerful, influential persons with the result that his popular-

ity was transformed into decided unpopularity. When he became a Complainant in discliplinary proceedings against a Judge as well as influential members of the bar, then his unpopularity hit a new high. From that time on, it seemed to be standard practice for judges to misapply the law and procedural rules to dismiss all of his cases, and likewise on appeal. Then he became a plaintiff in federal court against Horace Stern, et al., individually and jointly as Justices of the Supreme Court of Pennsylvania, which made the bias against him obvious and intensified it. What perhaps originated as bias in favor of his adversaries resulted in bias against him, and it has extended into other Districts. In the instant case your petitioner has referred to the District Judge's bias also in favor of defendants with whose attorneys the Judge's brother is associated. Yet the bias against her cause and her counsel is best characterized by the averments of this paragraph. Therefore, the intervening and not previously presented circumstances hereinafter set forth should be brought to the attention of this Honorable Court in support hereof.

6. Since the filing of the petition for writ of certiorari intervening circumstances of substantial or controlling effect have occurred and have not been previously presented, as follows:

A. On November 26, 1956, the United States Court of Appeals for the Seventh Circuit at No. 11595 denied rehearing in the case of Paul Ginsburg, Plaintiff-Appellant, v. John D. Black, et al., not yet reported. In that case plaintiff filed motions to strike pleadings which were false, impertinent, scandalous, libelous per se and admittedly unprovable; which motions were not granted by

the district court and ignored by the Court of Appeals, plainly an abuse of discretion. This conflicts with the Order (App. 22-23) of the Third Circuit in the case of Paul Ginsburg, Plaintiff-Appellant, v. Horace Stern, et al., wherein the appellees successfully filed a similar motion to strike and suppress pleadings for allegedly being scandalous, which contained matters that are presumptively as well as assertedly true and pertinent. (Petition, pp. 9-10). The answered but undenied allegations of the 7 CCA Petition for Rehearing (ten copies of which are filed herewith and marked Exhibit "A") show further evidence of bias against your petitioner's counsel and in favor of his adversaries. In connection therewith it also shows how defendants therein "legally" cheated a Trust Estate out of millions of dollars and Paul Ginsburg out of his good name and earnings.

B. On December 18, 1956, in the case of Paul Ginsburg v. Horace Stern, et al., individually and jointly as Justices of the Supreme Court of Pennsylvania, Civil Action No. 14240 in the district court for the Western District of Pennsylvania, Judge John W. McIlvaine entered an Order dismissing the Complaint on the ground of judicial immunity from suits for violation of the Civil Rights Acts. In the first place, the defendants did not even plead immunity as a defense; and in the second place, under the law of the Third Circuit there is no such immunity (See *Picking v. Pennsylvania R. Co.*, 151 F2d 240). The law of the Picking case has been upheld by this Honorable Court in *Tenney v. Brandhove*, 341 U.S. 367, 97 L. Ed. 1019 (1951), which permitted only one specific exception. Counsel for the defendants is former Attorney General (Pa.) Herbert B. Cohen (and an associate) who therein committed errors

in law and procedure as well as breaches of the Canons of Professional Ethics. Cohen filed three preliminary motions which contained the most reckless, scandalous, false and impertinent allegations, obviously unprovable and insupportable. Within a few days thereafter, Paul Ginsburg filed a motion under Rule 11 to have Judge McIlvaine order Cohen to file written explanatory statements in court to show what good grounds, if any, exist to prove said allegations. In addition to Rule 11 the plaintiff cited in support thereof *US. v. American Surety Co.,* 25 F.Supp. 225; *American Automobile Ass'n, Inc., et al. v. Rothman,* 104 F.Supp. 655 (1952); and *Re: Disbarment of Morris Lavine,* 126 F.Supp. 39 (1954), reversed, 217 F2d 190, for denial of due process. Plaintiff argued that the granting of his motion under Rule 11, and Cohen's obvious inability to comply, could place him in position to move for summary judgment. Nevertheless, to protect Cohen from being a respondent under Rule 11 like in the Rothman and Lavine cases and to protect the defendants from an adverse judgment, and to continue the discriminatory actions against your petitioner's counsel, Judge McIlvaine ignored the motion which he should have acted upon at the outset. In Judge McIlvaine's Opinion, not yet reported, he stated that many of the defendants "are close personal friends"; and he criticized Paul Ginsburg for his charges of prejudice and conspiracy which he would not even require the defendants to answer and which must be taken as true. Judge McIlvaine seems completely unaware of his own bias. He apparently believes that Paul Ginsburg has had his day in court in that proceeding. In his opinion he stated, "He has not been denied his day in court, nor should he be". He believes this because one

day Paul Ginsburg was in court for an argument. He does not realize that, when he ordered the complaint dismissed by misapplying the law and federal Rules of Civil Procedure, he denied plaintiff his constitutional right to a day in court,—a right which Judge McIlvaine did not give him and which he cannot take away. It would necessarily follow that Judge McIlvaine believes Anne Livingston Behr, petitioner herein, has had her day in court simply because her counsel appeared several times before his Associate Judge Marsh just to try to get her day in court. Judge McIlvaine overlooked or misapprehended the point that his Associate Judge Marsh admitted in his Opinion ". . . mistakes of law in decisions I have made in the past in various phases of this and of another action." (See the last sentence of the third reason for granting the writ, page 16 of the Petition.) It is respectfully submitted that since Judge Marsh, to this day, has done nothing to correct these admitted mistakes, they can no longer be considered as mistakes.

C. Hon. John W. McIlvaine's Opinion which was unduly and unfairly critical of petitioner's counsel, at the same time praised defendant Horace Stern "as a great and good judge, and in the words of the Chief Judge of this Circuit, a 'Judge's Judge' ". Now your petitioner observes Judge McIlvaine as a Judge's Judge, for he deliberately omitted (with bias) the words of the Chief Judge of this District about the same Chief Justice Horace Stern, stated for the official record (not in a farewell address) in another suit of Paul Ginsburg v. Horace Stern, et al., now pending in 3 CCA at No. 12052, as follows: "said action (by Stern) and procedure that followed (by Stern) was contrary to established

rules and custom and was violative of basic concepts of justice".

D. Hon. John W. McIlvaine decided that the Chief Justice and the Associate Justices of the Pennsylvania Supreme Court not only are above the law, but also are above criticism. The Honorable George Wharton Pepper, Pennsylvania's leading lawyer, recently made a declaration for the bar and the citizenry that courts are not above criticism, not even the Chief Justice and the Associate Justices of this Honorable Court. His declaration went undenied and undisputed, and was accepted nationally. This Honorable Court has held time and again that nobody is above the law. Mr. Justice Douglas, dissenting in Tenney v. Brandhove, supra, held (pp. 381-3): "No other public official has complete immunity for his actions"; and "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends"; and "I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain". Here it is appropriate to refer to a recent situation in which the above mentioned Herbert B. Cohen while Attorney General of Pennsylvania perverted his power and brought down on petitioner's counsel the whole weight of government for an illegal or corrupt purpose; and Judge McIlvaine's refusal to grant said Motion under Rule 11 kept Cohen in position to do so. On October 22, 1956, in the Court of Quarter Sessions of the Peace In and For the County of Dauphin, Pennsylvania, No. 288 June Sessions, 1956, in the matter of the investigation of the Pennsylvania Turnpike Commission,

petitioner's counsel presented in open court a Motion for Leave to File a Petition to Enlarge the Scope of the Grand Jury Investigation,—to include an investigation of the Office of Attorney General Cohen. The court ordered said motion filed as part of the proceedings and took it under advisement. Two hours later Cohen had a criminal information charging libel lodged against petitioner's counsel for presenting said motion in court. Anybody learned in the law knows that the essential ingredient of publication is lacking; the occasion was absolutely privileged; and since the averments were directed at a public official who was also a candidate for public office, their truth or falsity is immaterial. Nevertheless the court in Dauphin County at No. 436 Sept. Sessions, 1956, has this 31st day of December, 1956, denied a Motion to Quash the Information. Cohen had this trumped-up, wholly insupportable libel charge broadcast widely by the wire services as well as radio and television; and his corrupt and illegal purpose in doing so was well served.

E. Petitioner is compelled to call to the court's attention one more situation to show the extent of the bias against her counsel, and how gravely in error Judge McIlvaine's Opinion is in respect to the Chief Justice and the Associate Justices of the Pennsylvania Supreme Court who considered the appeal of C. S. Helmig against Rockwell Manufacturing Company at No. 181 March Term, 1954. Helmig had secured a jury verdict of $177,811.20 for breach of contract, after which judgment n.o.v. was entered by the court for Rockwell, and affirmed by the Supreme Court. At that point Helmig's attorney abandoned all hope and withdrew. Petitioner's

counsel, Paul Ginsburg, entered his appearance for Helmig and through succeeding procedural steps won the case for Helmig but only on the record. The record finally became cleansed by defendant's sworn admission that the sole basis for the judgment n.o.v. had been eliminated. At that stage petitioner's counsel on behalf of Helmig presented a Petition (ten copies of which are filed herewith and marked Exhibit "B") which showed that the Court had no alternative but to open up and vacate the judgment n.o.v. and reinstate the jury verdict then worth in excess of $200,000.00. The petition was denied. Subsequently, the lower court Judge wrote a letter to petitioner's counsel admitting he was wrong, but would not correct it. Promptly petitioner's counsel filed a Petition for Reconsideration quoting said letter (ten copies of which are filed herewith and marked Exhibit "C"), which was denied on October 6, 1956. Here was a case before the Pennsylvania Supreme Court with the record showing admissions by the defendant and the court below that they were wrong, and still a stubborn, biased refusal to grant legal relief to Paul Ginsburg's client.

7. It is respectfully submitted that if Judge McIlvaine really believes the legal address of Judges is in care of The Ivory Tower, Somewhere In Heaven, he should be reminded that he and his Associates and Superiors have been appointed for "good behavior", which negates the impossibility of bias and corruption; that for several years the leading Bar Associations have sponsored judicial reform movements aimed at the elective system of judges, to keep politics and political decisions off the bench, and the chief advocate thereof is the Honorable Arthur T. Vanderbilt, Chief Justice of New

Jersey, whose principal target has been the Commonwealth of Pennsylvania; and that the procedure for impeachment of judges has been sucessfully invoked from time to time, which also negates the absence of bias and corruption. Perhaps this reminder will bring Judge McIlvaine back down to earth, where judges are sworn to uphold the Constitution and to dispense Equal Justice under The Law.

Wherefore, your petitioner prays that the Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioner.

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## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.

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